

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 91-286-E - ORDER NO. 92-335 ✓

MAY 27, 1992

IN RE: Broad River Electric Cooperative, Inc.,)	
)	ORDER
Complainant/Petitioner,)	ALLOWING
)	CITY TO
vs.)	SERVE
)	CUSTOMER
Board of Public Works, City of Gaffney,)	WITHOUT
)	OBTAINING
Defendant/Respondent.)	CERTIFICATE
)	
)	

STATEMENT OF THE CASE

This matter is before the South Carolina Public Service Commission (the Commission) by way of a petition filed on May 15, 1991, by Broad River Electric Cooperative (BREC), complaining of an extension of electric service to the premises of the South Carolina Employment Security Commission by the Board of Public Works, City of Gaffney (the City). BREC requested that the Commission issue a preliminary cease and desist order restraining the City from further construction of any electric line or service in the unassigned territory in which the affected premises were located, and that the Commission issue a final order enjoining the City from further service in this area without obtaining a certificate of

public convenience and necessity, requiring the City to disconnect electric service to the South Carolina Employment Security Commission, and directing the City to remove its line.

The City answered the Petition, denying the allegations that the City's extension of service to this customer was unlawful. The Commission denied the Cooperative's Petition for Preliminary Cease and Desist Order on May 31, 1991. A hearing was held in this matter on November 6, 1991, at 10:30 a.m., in the Commission's hearing room, the Honorable Henry G. Yonce, presiding. John F. Fantry, Jr., Esquire represented BREC; Robert T. Bockman, Esquire, represented the City; and Marsha A. Ward, General Counsel, represented the Commission Staff.

BREC presented Robert C. Carroll, General Manager of BREC, in support of its position; and the City presented H.F. Crater, Jr., General Manager of the Board of Public Works of the City of Gaffney, in support of its position. Six Hearing Exhibits were admitted into evidence by the parties.

STATEMENT OF THE ISSUES

- I. Whether the City is collaterally estopped from serving the requesting customer in this unassigned area without a certificate of public convenience and necessity because of the Supreme Court's ruling in Duke Power Company v. The Public Service Commission of South Carolina, ___ S.C. ___, 387 S.E.2d 241 (1989).
- II. Whether BREC's corridor rights preclude the City from serving the customer.
- III. Whether the City may serve the customer without obtaining a certificate of public convenience and necessity.

FACTS

1. The City's construction occurred in a location outside the corporate limits of Gaffney.

2. Duke, an electrical utility under S.C. Code Ann. §58-27-10 (1976), had lines and customers in the unassigned area where the extension occurred [Hearing Exhibit 1, Deposition of David Gilliam, p. 7, line 19 through p. 8, line 4.].

3. The City was already serving several customers in the unassigned area. The City has provided electric service to the Highway Department office since January, 1989. The City also has been serving a trucking terminal directly across Highway 105 from the Highway Department since 1984. The City serves numerous other customers in this same unassigned area.

4. The customer is located in unassigned territory between Highway 105 and Twin Lakes Road, approximately 1150 feet from the Gaffney city limits. The property on which the customer is located is contiguous to the Highway Department building.

5. The extension to the customer was made from the line serving the Highway Department.

6. The City extended its existing three-phase line approximately 232 feet underground to serve the customer.¹

7. The customer's location is within 270 feet of the single-phase line of BREC.

1. BREC contends that the City constructed a 387 foot extension to connect the customer, however, the City's witness testified that the actual construction was 232 feet. TR., p. 58.

DISCUSSION

I. THE CITY IS NOT COLLATERALLY ESTOPPED FROM SERVING THE
EMPLOYMENT SECURITY COMMISSION WITHOUT A CERTIFICATE.

At the opening of the proceedings and prior to the presentment of witnesses, BREC moved that the City be collaterally estopped from challenging the need for a Certificate in the unassigned area in which the Customer is located. BREC based its motion on the general rule adopted by the Supreme Court that "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether in the same or a different claim." S.C. Property & Cas. Ins. v. Wal-Mart, ___ S.C. ___, 403 S.E.2d 625 (1991); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (1984). BREC points out that principles of collateral estoppel are applicable to a final decision of an administrative agency. St. Phillip's Episcopal Church v. S.C. Alcoholic Beverage Control Commission, 285 S.C. 335, 329 S.E.2d 454 (1985). Earle v. Aycock, 276 S.C. 471, 279 S.E.2d 614 (1981).

BREC argues that since the line that was extended to serve the customer came from the same line that was used as the starting point to serve Hamrick's,² that the City is collaterally estopped

2. The Hamrick's proceeding, Docket No. 85-570-E and 86-152-E, involved a complaint filed by Duke Power Company against the City for serving a Hamrick's facility without obtaining a certificate. The Commission initially ruled that no certificate was required because the City met the two-prong test of S.C. Code Ann., §58-27-1230(c). The Supreme Court ruled that the City did not qualify for the exemption under 1230(c). When the matter was

from serving the Employment Security Commission without first obtaining a certificate of public convenience and necessity. The Commission disagrees with BREC's collateral estoppel argument.

It is clear from a reading of Duke Power Company, supra, that the unassigned area in question in that case is not the same area in this case pending before the Commission. The Court was clear that the contiguous territory in Duke was "...the area north of I-85 and west of the City limits." 387 S.E.2d at 242. The Court in Duke limited its purview to the contiguous territory in which the customer was located, not the entire unassigned area. Here, the customer is in another area. It is south of I-85 and to the west of the City. In fact, Duke Power's assigned territory is between the Hamrick's location and the Employment Security Commission.

The Commission finds that the facts of this case constitute a different action. The facts and issues of this case were not litigated in Duke Power, supra, nor were they litigated on remand to the Commission. In fact, BREC raises different issues in this matter, such as corridor rights, which were not adjudicated in the Hamrick's case. More importantly, the fact that the extension to serve the Employment Security Commission originated from the same line extended to serve Hamrick's in another part of the unassigned

(Footnote 2 continued from previous page)
remanded to the Commission, the Commission found that the City did not qualify under 1230(b) or the Revenue Bond Act for an exemption to serve Hamrick's and must request a certificate to serve that customer. See, Order No. 91-771.

territory encircling the City of Gaffney is not controlling. The Court focused on the area served, not the location of the beginning of the extension to make its ruling. The facts and law of this case have not been litigated, and BREC's motion is hereby denied.

II. BREC'S CORRIDOR RIGHTS ARE NOT EXCLUSIVE AS TO THE CITY.

During the hearing, BREC witness Carroll stated that the City's service to the Employment Security Commission was being challenged because the customer was located within BREC's corridor rights. TR., pp. 22, 23-24, 33, 35. Under S.C. Code Ann., §58-27-620(1)(b)(1976), Mr. Carroll testified that BREC has the right to provide electric service to the premises.

As the Court has stated, "corridor rights, however, may be asserted only against 'electrical suppliers' which, by definition, excludes municipalities. S.C. Code Ann. §58-27-610(1)(1976)." The City of Rock Hill v. The Public Service Commission, et al.

___S.C.___, 382 S.E.2d 888 (1989). It is clear, therefore, that any corridor rights that BREC may have to serve the customer would not be exclusive as to the City. Therefore, BREC's corridor rights would not prevent the City from serving the Employment Security Commission.

III. THE CITY MAY SERVE THE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION WITHOUT OBTAINING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

A municipality is legally perceived as an "electric utility" for the purpose of extensions of electric systems beyond municipal limits. S.C. Code Ann., §58-27-10 (1976). Both the City and BREC cite to §58-27-1230 (1976) in support of their positions. The City

states that the provisions of §58-27-1230 grant it an exception wherein it may serve the South Carolina Employment Security Commission without first obtaining a certificate. BREC cites §58-27-1230 as not providing an exception to the certificate requirement, and further, BREC states that the consideration of a certificate for Gaffney to serve the Employment Security Commission is outside the scope of this proceeding. The Commission has considered the arguments of both the City and Broad River and finds that §58-27-1230 is inapplicable to the facts before the Commission.

The Commission is of the opinion that §58-27-1210 controls the situation at bar. Section 58-27-1210 states that:

When ordered by the Commission, after a hearing, any electrical utility, distribution electric cooperative, or consolidated political subdivision, may be required to establish, construct, maintain and operate any reasonable extension of its existing facilities. If any such extension, however, will interfere with the service or system of any other electrical utility, distribution electric cooperative, or consolidated political subdivision, the Commission may, on complaint and after hearing, either order the discontinuance of such extension or prescribe such terms and conditions with respect thereto as may be just and reasonable. Each electrical utility, distribution electric cooperative, and consolidated political subdivision, within areas assigned to it by the Commission and within three hundred feet of its lines, as defined in §58-27-610, shall be obligated to comply with all requests for service in accordance with its schedules of rates and service rules and regulations on file with the Commission.

For the purposes of the Commission's review of this matter, the last sentence of §58-27-1210 provides the pertinent information. The fact that the Employment Security Commission was

within three-hundred feet of Gaffney's lines precludes the Commission's consideration of §58-27-1230.

The municipality is operating outside of its municipal limits and therefore is an electric utility for definitional purposes. Additionally, the requesting customer is within three-hundred feet of the City's lines. The section relating to "within areas assigned to it by the Commission" is not applicable to a municipality since the Territorial Assignment Act does not allow for assignment of territory to municipalities. Further, it is the Commission's opinion that the requirement that the request must be "within areas assigned to it by the Commission and within three-hundred feet of its lines" is not conjunctive. There are facts that would make these requirements severable. As previously noted, the Territorial Assignment Act is not applicable to municipalities and there are instances under the Territorial Assignment Act where the territory may have been assigned to an electric cooperative or an electric utility but for areas within three-hundred feet of existing lines of all electric suppliers at the time of the assignment. These exceptions create an anomaly, and therefore, the requirement that the extension must be within areas assigned to it, and within three-hundred feet of its lines is severable.

Under §58-27-1210, the City has an obligation to comply with the request for service from the Employment Security Commission. It is the Commission's interpretation of §58-27-1210 that a certificate of public convenience and necessity is not necessary

for a municipality lawfully operating outside its municipal limits to provide service to a requesting customer within three-hundred feet of its existing lines. To require the municipality to seek a certificate of public convenience and necessity each time it seeks to serve a requesting customer, which in this instance is next door to its existing service, would be an unreasonable burden and would, in the Commission's opinion, thwart the intent of the law as well as place a unreasonable burden on the municipality.

IV. MISCELLANEOUS

During the direct testimony of the City's witness Crater, BREC objected to Mr. Crater's testimony relating to Commission Order 85-61. Counsel for BREC based his objection on his earlier collateral estoppel issue and the Commission's recent ruling in Broad River Electric Cooperative, Inc. v. The City of Union. The Commission stated that it would take the objection under advisement and rule on it in the final Order. The Commission has reviewed Order No. 85-61, issued in Docket No. 84-252-E. Further, the Commission has reviewed the procedural history of that Order and finds that as to the question of whether or not the City was lawfully serving in the unassigned area, Order No. 85-61 is pertinent. In fact, that decision was upheld by the Circuit Court after the City of Gaffney had appealed Order No. 85-61. Whether or not the Order reflects the Commission's interpretation of §58-27-1230(c) is beside the point. The Order allowed the City to lawfully serve in that area and to that extent the Order may be relied upon. The Commission relies on no other part of that Order

in this decision.

Additionally, counsel for BREC objected to certain testimony put forth by the City relating to whether or not the prior extension was financed under a Revenue Bond Act. The Commission finds that it does not rely on any testimony relating to the Revenue Bond Act or any extension of Gaffney related to the Bond Act or any BANS.

CONCLUSION

Therefore, the Commission has determined that the City of Gaffney may lawfully serve the South Carolina Employment Security Commission without obtaining a Certificate of Public Convenience and Necessity because under §58-27-1210 it is within three-hundred feet of the City's lines and the City is obligated to serve a requesting customer. The argument of collateral estoppel put forth by Broad River Electric Cooperative is not applicable to the facts of this case, and Broad River's argument that the requesting

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customer is within its corridor does not preclude the City from serving the customer.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)